UNITED STATES
v.
RONALD B. TIPPETTS

IBLA 77-36 Decided March 31, 1977

Appeal from the decision of Administrative Law Judge Dean F. Ratzman rejecting an application to purchase a trade and manufacturing site (Contest No. AA-204).

Affirmed.

1. Alaska: Headquarters Sites--Alaska: Trade and Manufacturing Sites

An applicant to purchase either a trade and manufacturing site or a headquarters site has the burden of proving that he has complied with the requirements of the law, 43 U.S.C. § 637a (1970). Rejection of such an application is proper where the evidence shows that the tract was used (1) for trapping by the applicant to repay a neighbor for assistance in improving the site, and (2) as a wilderness camp area, and that no substantial revenue was derived from the trapping, and nominal revenues were derived from camping tourists in the park during the life of the claim.

2. Alaska: Headquarters Sites--Alaska: Trade and Manufacturing Sites--Applications and Entries: Generally--Equitable Adjudication: Generally--Settlements on Public Lands

Where an applicant to purchase a trade and manufacturing site or a headquarters site states he was frustrated in completing his improvements and showing sufficient use of the land as required by the law because of

more difficult or complex problems than anticipated, but has not shown that this operation could reasonably be expected to be successful, such problems will not afford any basis for equitable adjudication of his application to purchase.

3. Administrative Authority: Generally--Administrative Authority: Estoppel--Federal Employees and Officers: Authority to Bind Government

Reliance upon erroneous advice by Bureau of Land Management employees cannot estop the United States or confer upon an applicant any rights not authorized by law. 43 CFR 1810.3(c). Where it is not established that the asserted advice was erroneous, estoppel does not operate.

APPEARANCES: Ronald B. Tippetts, pro se; Harold Kip Wells, Esq., Office of the Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Ronald B. Tippetts appeals from the October 7, 1976, decision of Administrative Law Judge Dean F. Ratzman, which rejected his purchase application for a trade and manufacturing site located under the provisions of section 10 of the Act of May 14, 1898, 30 Stat. 413, as amended 43 U.S.C. § 687a et seq. (1970).

Appellant's notice of location, filed August 25, 1966, asserted settlement of an 80-acre parcel and claimed use as a recreational facility, wilderness park, and rock and botanical garden. Appellant's purchase application, filed August 24, 1971, showed use and improvement of the tract as the Tiekel River Wilderness Park. He asserted that 20 acres were covered by approximately $ 3,500 worth of improvements, consisting of 1 log cabin, a 1,200-foot earthfill roadway, 2 wilderness hiking trails to scenic spots in the park, picnic spaces, a garbage pit, and 8 trash barrels. Accompanying the purchase application, appellant included a copy of his Alaska Business License application, a letter confirming insurance coverage for the Park, and letters from three individuals who paid admission fees totaling $ 1.25 in August of 1971.

By decision of January 10, 1972, the Alaska State Office, Bureau of Land Management (BLM), required that appellant submit additional

evidence in support of his claim or show cause why his application should not be rejected and his claim canceled. That decision further pointed out that:

> * * * the Department has consistently held that the right to acquire a trade and manufacturing site in Alaska is limited to those lands which are actually occupied and used by the applicant for the purpose of trade, manufacture or other productive industry and that he can obtain title to only that portion of the claim which he has improved and is using and occupying at the time of filing of his application to purchase (Wilbur J. Erskine, 51 L.D. 194 (1925)). The applicant cannot purchase land under this act which he intends to improve at a later date. See 43 CFR 2562.3(d)(1). [Emphasis in original.]

Additional information was provided, including copies of appellant's insurance policy, his 1971 Alaska Business License, and a fourth individual's receipt for staying at the Park in August of 1971. Appellant asserted that he has advertised by placing signs along the highway. However, concerning the lack of revenues from the venture, he explained that it was due to cold rainy weather, few camping tourists in the area during the August 11 -- September 13, 1971 period, and a reluctance on the part of tourists in the area to pay for camping spaces. He stated that:

> * * * I will be the first to concede that I possibly made an error in business judgment concerning the volume of business that I could expect during the 1971 season. However, the wilderness park was opened in good faith and with hope and expectation of doing much more business than resulted. Although the $ 1.75 is a very small revenue, it was in fact the only income which I received during the summer and fall of 1971.

Appellant contended that his improvements, and particularly the roadway, were expensive, time consuming, and difficult to construct. Appellant further asserted that he had contacted the BLM Office in June of 1971 because he was apprehensive that, despite his work investment, the BLM would regard his being open for only 2-3 weeks as inadequate. He claimed that the "BLM Real Property Officer" informed him that, in his opinion, he could purchase the area covered by his improvements if he got the improvements completed, plus a few paying customers before the expiration of the 5-year statutory period.

On March 18, 1976, BLM, filed contest proceedings charging that appellant's purported use of the land within the T&M site was

insufficient to support a valid claim initiated and maintained pursuant to section 10 of the Act of May 24, 1898. Appellant answered that complaint, asserting that 10 of the 80 acres in the parcel had been used and occupied as required by law and regulation.

On August 27, 1976, a hearing was held. However, due to "unforeseen personal matters" the appellant failed to appear and did not send a representative. Instead, he transmitted a letter with two accompanying affidavits to the BLM stating his position. Appellant asserted further use and occupancy of the site for trapping in the winter of 1966-67. During that period appellant claimed to have lived in a trailer on the site, storing traps, snowshoes, artic clothing, and guns in his cabin. Appellant asserted that he trapped and sold furs to assist and repay his neighbor who had given him much help in improving his T&M site. He also states he sold one pelt for $ 70. Furthermore, appellant's affidavits revealed that problems had arisen with the construction of his improvements, hindering their completion. Therefore, in view of the location of the improvements which he was able to complete, appellant stated that he wished to purchase only a 10-acre parcel encompassing "the log cabin, and 3 nature trails, the 2 camping spaces, the outdoor toilet, and one half of the total constructed roadway." However, in the event his right to purchase the 10-acre parcel was denied, appellant asserted that he had qualified for a 5-acre headquarters site surrounding his cabin.

At the hearing, BLM presented evidence of a field examination taken by Stuart Hirsh, a realty specialist, on August 18, 1976. In view of his examination of the area and inspection of the Bureau's records, it was his opinion that the appellant had not made a satisfactory showing of sufficient compliance to allow purchase of the site (Tr. 10; Ex. 1).

By decision of October 7, 1976, Administrative Law Judge Dean F. Ratzman found that the BLM had sustained its charge of insufficient use to support a valid claim. Mr. Tippetts' principal reason for running his neighbor's trap line was to repay the neighbor for assistance given by the latter and his family in constructing the Tippetts' cabin, for watching the property when Mr. Tippetts was not there, and for providing meals to Mr. Tippetts. The trapping work was not developed into a business or productive industry. There is no indication that Mr. Tippetts ran a trap line during seasons subsequent to the winter of 1966-1967. Thus the land was not occupied or used for trapping at the time the purchase application was filed.

[1] There has been no showing that the claim was utilized in connection with a business or industry established by Mr. Tippetts

or his employer at another location. Therefore, the contestee is not entitled to purchase as a headquarters site a tract not exceeding 5 acres under the 1927 amendment to the trade and manufacturing site law, 43 U.S.C. § 687a (1970).

Contestee's efforts to establish a wilderness park were made just before expiration of the 5-year deadline, and he received less that $ 2 from only four customers. Mr. Tippetts concedes that he possibly made an error in business judgment. We conclude that the asserted use of the land for business purposes was insufficient. The operation was "so meager in clientele and gross receipts" that it does not qualify under the applicable law and regulations. Lee S. Gardner, A-30586 (September 26, 1966).

In his appeal, Mr. Tippetts attacks the sufficiency of the BLM's case and Judge Ratzman's determinations and conclusions. However, it is evident from the record on appeal that BLM, through its testimony and exhibits, established a prima facie case of lack of use. The decisive issue in this appeal is whether the appellant made a satisfactory showing that he was engaged in commercial operations on the land applied for during the statutory period, including the time of filing of the application to purchase, as would satisfy the requirements for either a T&M or headquarters site. It was his burden to present the necessary evidence to establish that he had complied with the requirements of the law. Bythel J. Compton, 18 IBLA 148 (1974); David A. Burns, 6 IBLA 171 (1972); Don E. Jonz, 5 IBLA 204 (1972); Van Ragsdale, A-21175 (July 13, 1938). The law states, in part, that:

> Any citizen of the United States * * * thereafter in the possession of and occupying public lands in Alaska in good faith for the purpose of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding 80-acres * * * upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry * * * Provided, that any citizen of the United States * * * employed by citizens of the United States * * * whose employer is engaged in trade, manufacture, or other productive industry, and any citizen of the United States * * * who is himself engaged in trade, manufacture, or other productive industry may purchase one claim, not exceeding five acres, or unreserved public lands * * *. 43 U.S.C. § 687a (1970).

Neither the law nor departmental regulations specify the size or nature of a business or industry that qualifies for a T&M or

headquarters site. However, an applicant wishing to purchase the tract must submit evidence from which it can be concluded that he was engaged in actual business operations from which he reasonably hoped to derive a profit. Thelma S. Butcher, 7 IBLA 48 (1972); Jay Frederick Cornell, 4 IBLA 11 (1971), aff'd Civ. No. 73-1930 (9th Cir. 1974); Kenai Power Corp., 2 IBLA 57 (1971); Hershel E. Crutchfield, A-30876 (September 30, 1968). This does not mean that a modest operation or even an unprofitable one would necessarily fail to qualify, but there should be evidence of activity of such a nature that a reasonable return could be expected. Hershel E. Crutchfield, supra; James E. Allen, A-30085 (February 23, 1965).

The validity of the appellant's claim hinges on the sufficiency of his two alleged uses during the life of his claim. However, neither his trapping nor his wilderness park, whether considered jointly or separately, are evidence of an investment or activity of such a nature that a reasonable return could be expected.

Appellant's use of the land for trapping, alleged for the first time on appeal, was apparently not being conducted at the time of filing his application to purchase. As such, it does not satisfy the statute and regulation under Erskine, supra. Further, appellant has not shown that his trapping during the winter of 1966-67 was carried out as an actual business operation. It was in large part for the benefit of his neighbor, to repay him for his aid in improving appellant's tract. An analogous case, James E. Allen, supra, concerned an applicant who attempted to purchase a T&M site for use as a commercial airstrip. One of his alleged uses of the field was that he flew in mail, supplies, and furnished transportation for the five residents of the peninsula. In that case, as in the present one, the applicant failed to show that he has derived revenues from his services. As was the determination of the Department in Allen, this Board cannot conclude that the applicant's service to his neighbor was not wholly incidental to his own personal use of the tract.

Appellant's improvements and alleged use of the tract as the Tiekel River Wilderness Park yielded some $ 2.00 for the 1971 camping season. A wilderness park yielding such nominal revenues as this does not qualify as a productive industry which would support an application to purchase a T&M site. Cf. Lee S. Gardner, A-30586 (September 26, 1966); James E. Allen, supra. As was stated in Allen:

> * * * The law does not require the existence of a full-blown enterprise before a patent can issue. We do not believe, however, that the law can be interpreted to encompass an operation so

> infrequently used by customers and so unproductive of gross receipts as the business operated by the appellant here during the life of his claim.

[2] In his appeal, appellant asserts that he was entitled to equitable adjudication of his claim so that he could purchase a portion of the tract improved. This assertion is apparently based on problems encountered with constructing his improvements and the lack of customers during the 1971 camping season.

Appellant's argument has no merit, for it was he who chose this particular site for this particular business. The fact that his plans regarding his improvements or his estimated business returns were frustrated by difficulties which arose at the time is of no avail. As the appellant chose the site and the business, he chose the inherent problems of improving the tract and conducting the business operations. Appellant has even conceded that he "possibly made an error in business judgment concerning the volume of business" he could expect during the 1971 season. He has not shown that the type of operation he contemplated could reasonably be expected to be successful. Absent such a showing, the fact that the problems were more difficult or complex than anticipated does not afford a basis for equitable adjudication. Cf. Bernard L. Marsh, 12 IBLA 371 (1973).

[3] Appellant also asserts in his appeal that the Bureau "by both its own actions and inaction was estopped to deny the sufficiency of appellant's use of the land here in question * * *." The basis for this appears to have originated with appellant's discussion in June of 1971 with a BLM employee, titled by appellant as the "BLM Real Property Officer." Appellant asserted that he contacted this employee because he was apprehensive about his qualifications under the law. By appellant's own recount of the conversation, that employee gave no assurances, only his opinion regarding the steps necessary for qualification to purchase the tract. The alleged advice given was not patently erroneous. He has not shown erroneous advice and reliance thereon that would form the basis of estoppel. Cf. United States v. Wharton, 514 F.2d 406 (9th Cir. 1975).

As appellant failed to present sufficient evidence of a commercial operation on the land to meet with the purchase requirements of the law, rejection of the application to purchase all or a portion of the trade and manufacturing site was necessary.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman

Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I concur in the result, but would limit the decision to findings that:

1. Appellant has not shown "possession * * * and occupying * * * for the purposes of * * * productive industry" 1/ under 43 U.S.C. § 687a (1970).

2. As to appellants claim of laches, it is a general rule that laches is no defense against protection of the public interest by the Government. See INS v. Hibi, 414 U.S. 5 (1973).

3. Appellant has not shown the improper actions or erroneous advice, and reliance thereon, which could be the basis of any estoppel. Cf., e.g., Matter of Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975), construing Hibi and holding the United States to be estopped.

Appellant asserts the camp grounds were open for 1 month only. The records show that by the following spring his permanent address was Monroe, Oregon. The fact that an operation is meager in customers and receipts, or that the only income has been in the form of services received from a neighbor, may be evidence the land is not occupied for productive industry, but is not in itself conclusive. An unprofitable operator can in some instances still qualify under the Act. Hershel E. Crutchfield, supra. Among the possible situations, if an applicant had no sales because he was unexpectedly prevented from continuing to work or because his goods were destroyed, stolen or lost in transit, it could still be held that his other actions satisfied the statute. In all situations, however, the words "for the purposes of * * * productive industry" require an applicant to show, conclusively, efforts which are actual business operations from whence a reasonable return could be expected. Crutchfield, supra. This, appellant has not been able to do.

Joseph W. Goss

Administrative Judge.

1/ Emphasis added.